Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-852

STATE OF ALABAMA,
Appellee (Petitioner)

VS.

CHARLES WILLIAM CANNON,
APPELLANT (Respondent)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ATTORNEYS FOR PETITIONER

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IN THE

Supreme Court of the United States

October Term, 1977

No.

CHARLES WILLIAM CANNON,
Appellant (Respondent)

VS.

STATE OF ALABAMA,
Appellee (Petitioner)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, State of Alabama, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which was entered on September, 1977.

OPINIONS BELOW

1. This case began in Federal Court by Petition for a Writ of Habeas Corpus before the United States District Court for the Northern District of Alabama, Southern Division. A magistrate of that court made a Report and Recommendation which is set out in the Appendix.

The Honorable Clarence W. Allgood, District Judge, followed the recommendation of the magistrate and denied the Petition. We have been unable to find the Report of this case; it is copied in the Appendix.

2. A Motion for Certificate of Probable Cause was taken to the United States District Court for the Northern District of Alabama, Southern Division, and granted on April 21, 1976. A copy of this order is in the Appendix.

3. An Appeal was taken to the United States Court of Appeals for the Fifth Circuit, and it reversed the decision of the United States District Court on September 12, 1977. This decision is reported at 558 F. 2d 1211 (5th Cir., 1977). A copy of this opinion is in the Appendix.

4. A Petition for Rehearing was taken to the United States Court of Appeals for the Fifth Circuit and denied on October 20, 1977. A copy of this decision is in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 12, 1977. A timely Petition for Rehearing was filed and was denied on October 20, 1977.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND LAWS

1. The Federal Rules of Civil Procedure, 52(a), pertinent portion which provides:

> "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trail court to judge the credibility of the witnesses."

2. The Federal Rules of Civil Procedure, Rule 81(a)(2), pertinent portion which provides:

> "These rules are applicable to proceedings for . . . habeas corpus."

STATEMENT OF THE CASE

Respondent was indicated by the Grand Jury of Jefferson County, Alabama, on the charge of murder. Title 14, §314, Code of Alabama (1940) (recomp. 1958). A writ of arrest was executed, and the respondent was committed to the Jefferson County Jail on September 27, 1972. Respondent entered a plea of not guilty to said charge at arraignment on October 27, 1972. A Petition for Writ of Habeas Corpus was filed in the Circuit Court of the Tenth Judicial Circuit of Jefferson County, Alabama, which thereafter set bail in the amount of Twenty-five Thousand ($25,000) Dollars. On November 21, 1972, bail was reduced to Twenty Thousand ($20,000) Dollars by the Alabama Court of Criminal Appeals pursuant to the Petition for Writ of Habeas Corpus filed with said court on December 22, 1972.

A Motion for Discovery and Inspection was filed in the Circuit Court on February 8, 1973. A hearing on the motion was held prior to trial on February 12, 1973. The court denied the motion. Trial began on February 12, 1973. On February 18, 1973, the jury found the respondent guilty of second-degree murder and fixed punishment at 23 years in the penitentiary of the State of Alabama. The respondent was sentenced according to the verdict. On May 11, 1973, respondent's Motion for New Trail was denied. Notice of Appeal was filed. Following his conviction, respondent took an appeal to the Alabama Court of Criminal Appeals which was affirmed in a decision reported as *Cannon v. State,* 53 Ala. App. 509, 301 So. 2d 272 (1974).

On March 7, 1975, a Petition for Writ of Habeas Corpus was filed in the United States District Court for the Northern District of Alabama, Southern Division. The Examination, Report and Recommendation of the United States Magistrate and Order of the Honorable Clarence W. Allgood denying relief were filed in the United States District Court. On April 14, 1976, respondent filed a Motion for Certificate of Probable Cause in appeal for habeas corpus which was granted.

Appeal was taken to the United States Court of Appeals for the Fifth Circuit, which court reversed the decision of the United States District Court for the Northern District of Alabama on September 12, 1977. The petitioner filed a Petition for Rehearing in the United States Court of Appeals for the Fifth Circuit which was denied on October 20, 1977.

REASONS FOR GRANTING THE WRIT

1. Petitioner's contention.

It is the contention of petitioner that in the interest of judicial efficiency and comity, the United States Courts of Appeals should accept the findings of fact of State Courts and United States District Courts unless such findings are clearly erroneous. (Federal Rules of Civil Procedures, 52(a).) The State of Alabama is mystified at the opinion of the United States Court of Appeals for the Fifth Circuit which substitutes the personal judgment of that Court for findings of facts found to be sufficient by the Courts of this state and by the U. S. Magistrate and the U. S. District Court for the Northern District of Alabama, Southern Division.

Petitioner contends that the United States Court of Appeals for the Fifth Circuit based its reversal in this case on its own view of the facts, substantially altering the findings of no less than five other courts. Petitioner asserts that the previous findings were clearly supported by evidence presented. Should the U. S. Courts of Appeals for the Fifth Circuit be upheld in its findings, then the finality of all verdicts of State Courts is in jeopardy, subject to the substituted opinion of federal judges.

In four instances, the United States Court of Appeals for the Fifth Circuit changed findings of fact of the United States District Court for the Northern District of Alabama, Southern Division, which findings were the same as those of the Courts of the State of Alabama. Petitioner asserts that the cummulative effect of these changes provided the basis for the reversal.

2. Denial of counsel at lineup.

The United States District Court for the Northern District of Alabama, Southern Division, found that two eyewitnesses were present at the time the respondent shot and killed one Jack Warren. In addition to these witnesses, the State called as a rebuttal witness, Eleanor Ann Adaway. Ms. Adaway testified that shortly before the incident occurred, she had been at the service station and had seen the respondent, who stared at her for approximately ninety (90) seconds (R. 852, 857, filed with the U. S. Court of Appeals for the Fifth Circuit). Ms. Adaway contacted police and approximately 2 weeks later positively identified the driver of the vehicle in which respondent was a passenger (R. 848-849, filed with the U. S. Court of Appeals for the Fifth (Circuit). She was unable to identify the respondent from photo arrays at that time.

Ms. Adaway came to the courthouse during respondent's trial and was asked by a policeman to look in the hallway and courtroom to see if she recognized anyone. She testified that she recognized respondent sitting between two black females in the hallway. There were other black males in the courtroom (R. 860-864, filed with the U. S. Court of Appeals for the Fifth Circuit).

The United States District Court for the Northern District of Alabama found, based on the foregoing facts, that the confrontation in the hallway did fall under the general catagory of a "line-up", requiring the presence of respondent's counsel as set out in *United States v. Wade,* 388 U.S. 218, 87 S.Ct. 1926, 18 L. Ed. 2d 1149 (1967). In such a situation, any testimony about the courthouse identification should have been excluded from the trial, according to the decision in *Gilbert v. California,* 388 U.S. 263, 87 S.Ct. 1951, 18 L. Ed. 2d 1178 (1967).

In the present case, United States District Court for the Northern District of Alabama found, *based on the facts,* that Eleanor Adaway's direct testimony concerning her seeing the respondent at the scene of the crime immediately prior to the shooting, had an independent source from the hallway confrontation. The Court stated that:

> "A careful reading of her testimony leaves little doubt that her in-court identification was founded upon her observation of him (Cannon) on the night Jack Warren was killed, and was not based on the confrontation outside the courtroom." (See U. S. District Court Opinion, p. 4, 5).

Petitioner contends that the United States Court of Appeals for the Fifth Circuit independently decided that the state had a "weak case" which was "going badly" in spite of the eyewitness identifications of Cannon prior to the testimony of Eleanor Adaway. *(Cannon v. State,* supra, at 1213, 1214 & 1217). The United States Court of Appeals for the Fifth Circuit then found Adaway unreliable in that she was the only witness to state that there were three persons in the vehicle at the service station rather than two. Based on its own inferences drawn from the facts, the U. S. Court of Appeals for the Fifth Circuit found Adaway's testimony not to be derived from an independent source, even though at the time of the photo identification of the driver of the car she stated to police that she could identify the person who stared at her if she ever saw him again (R. 925, filed with the U. S. Court of Appeals for the Fifth Circuit). She explained that "a picture doesn't convey an expression" (R. 850, filed with the U. S. Court of Appeals for the Fifth Circuit). Ms. Adaway

never identified anyone else as the person she saw in the car.

3. Varying inferences derived form the testimony of an eyewitness.

The United States District Court for the Northern District of Alabama, Southern Division, apparently accepted as reliable the eyewitness identification of respondent by Samuel Wheeler. Mr. Wheeler identified respondent as the man whom he saw kill Jack Warren.

The United States Court of Appeals for the Fifth Circuit, in spite of this finding, found Wheeler's story to be "badly impaired." *(Cannon v. State,* supra, at 1214). the United States Court of Appeals for the Fifth Circuit found that on cross-examination, Wheeler admitted that for four weeks he could not identify Cannon and told others that he did not know who committed the crime. This same court, on its own, apparently decided that the inference to be drawn was that Wheeler was coerced by police pressure to identify the respondent. *(Cannon v. State,* supra, at 1214). The petitioner contends that there other inferences which could have been drawn from this evidence. One such inference is that Wheeler was afraid to give information against the respondent, a man whom he said he had seen kill another human being.

Petitioner does not pretend to know what inferences the jury and the United States District Court drew from the evidence. Petitioner only asserts that the findings of both these bodies could have been based on the latter instance. Because of the differing possibilities, it cannot be said that the findings of the lower courts on the facts were clearly erroneous.

4. Suppression of evidence by the prosecution as affecting the outcome of the trial.

The United States District Court for the Northern District of Alabama, Southern Division, found that the testimony of Gracie Mae Sherrod was suppressed by the police department. The court cited *Barbee v. Warden, Maryland Penitentiary,* 331 F. 2d 842 (4th Cir., 1964) for the proposition that evidence known to investigating law enforcement officers is held to be also known by the district attorney whether or not the district attorney had actual knowledge of that evidence. The critical question before the court is whether there is more than a mere possibility that the evidence, found to be suppressed, would have affected the results of the trial. *Ross v. State of Texas,* 474 F. 2d 1150 (5th Cir., 1973).

Petitioner contends that Ms. Sherrod, who was at the service station prior to the incident, identified the driver of a car similar in color to the car described by the eyewitness Samuel Wheeler. The driver of that car, according to Sherrod's testimony, was one robert Daniel. (R. 8, filed with the U. S. Court of Appeals for the Fifth Circuit). It is unclear from the record whether Sherrod was able to eliminate a second man who she said never left the car while she was there as being Cannon. She testified that she "didn't pay no attention" to the second man. (R. 21, filed with the U. S. Court of Appeals for the Fifth Circuit). She did state that she knew respondent and did not know the second man in the car.

Petitioner agrees with the finding of the United States District Court for the Northern District of Alabama, Southern Division, that:

"Considering the whole record and evidence presented at trial, it is difficult to see that there is more than a mere possibility that the testimony would have changed the outcome of the trial." (United States District Court Opinion, p. 7).

The United States Court of Appeals for the Fifth Circuit reported as *Cannon v. State,* supra, at 1216 and footnote 9 at 1216 states that Ms. Sherrod had "eyewitness testimony positively identifying the passenger said to have committed the crime." There is no clear evidence to support this conclusion. The United States Court of Appeals for the Fifth Circuit has construed the testimony to its view of the case, without regarding the findings of the United States District Court for the Northern District of Alabama or the trial judge who heard the testimony in a hearing on Motion for New Trail.

5. Whereabouts of the driver of the vehicle not established.

Two witnesses at the trial identified the driver of the vehicle in which respondent was a passenger as one Josh Stephens. The United States Court of Appeals for the fifth Circuit, in *Cannon v. State,* supra, in a footnote at 1215, takes notice that the eyewitness identification of the driver by the state's chief witness was discredited by defense testimony that the day before the crime, the driver was in Durham, North Carolina.

Petitioner asserts that just because the driver, identified as Josh Stephens, was in Durham on May 30, and again in Durham on June 5, in no way proves that he could not have been in Birmingham, Alabama, on May 31, the day of the incident. The only testimony

tending to show his whereabouts at all on the night of the murder was that of the two eyewitnesses who say him with respondent. Apparently, the jury and the United States District Court for the Northern District of Alabama gave credence to that testimony. Petitioner asserts that in yet another instance the U. S. Court of Appeals for the Fifth Circuit has substituted its judgment for that of lower courts based on findings of fact.

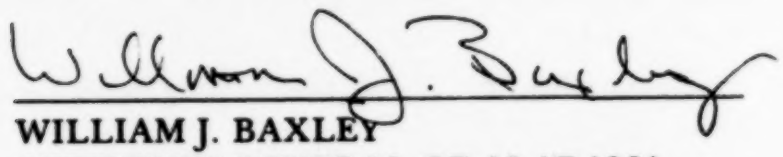
6. Finality of state court judgments jeopardized.

Petitioner asserts that it was the cummulative affect of the alterations in the findings of fact which formed the basis for the reversal by the U. S. Court of Appeals for the Fifth Circuit. We submit that absent a showing that the findings of fact in lower courts are clearly erroneous, the United States Courts of Appeals should not substitute their judgment for that of lower courts. The allowance of such alterations jeopardizes the finality of all state court verdicts.

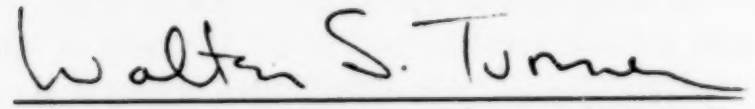
CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



WILLIAM J. BAXLEY
ATTORNEY GENERAL OF ALABAMA



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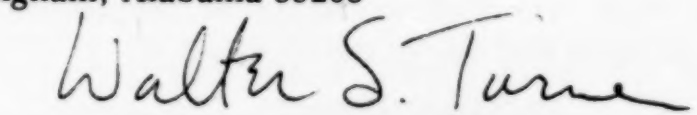
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I, Walter S. Turner, Chief Assistant Attorney General of Alabama, one of the attorneys for petitioner, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this the _____ day of December, 1977, I did serve the requisite number of copies of the foregoing Petition for Writ of Certiorari upon the attorney for the respondent, by mailing the same to him, first-class postage prepaid, and addressed to him as follows:

Honorable Robert R. Bryan
The Florentine Building
2021 Second Avenue, North
Birmingham, Alabama 35203



WALTER S. TURNER, CHIEF
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

Address of Counsel:
250 Administrative Bldg.
Montgomery, Alabama 36130

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
October 20, 1977

Edward W. Wadsworth
Clerk

Tel 504—589-6514
600 Camp Street
New Orleans, LA 70130

TO ALL PARTIES LISTED BELOW:

NO. 76-2118 — CHARLES WILLIAM CANNON v. STATE OF ALABAMA

Dear Counsel:

The enclosed order has this day been entered on petition ( ) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By _____
Deputy Clerk

cc. Mr. Robert R. Bryan
Mr. Leon St. John
Mr. Randloph P. Reaves
Mr. Barry V. Hutner

ENTERED FOR THE COURT

_____
United States Circuit Judge

Form 703-2

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 76-2118

U. S. Court of Appeals
FILED
Oct. 20, 1977
Edward W. Wadsworth
Clerk

CHARLES WILLIAM CANNON,
Petitioner—Appellant,

versus

STATE OF ALABAMA,
Respondent—Appellee.

Appeal from the United States District Court for the Northern District of Alabama

---

ON PETITION FOR REHEARING

(October 20, 1977)

Before GOLDBERG, SIMPSON, and FAY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT

_____
United States Circuit Judge

Form 703-2

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHARLES WILLIAM CANNON,	)	
	)	
Appelant	)	
	)	
—VS—	)	CASE NO. 76-2118
	)	
STATE OF ALABAMA,	)	
	)	
Respondent	)	

APPLICATION FOR HEARINGS

Comes now the State of Alabama, appellee in the above-styled cause, by and through its Attorney General, William J. Baxley, and moves this Honorable Court to render unto it a rehearing in said cause, praying that the judgment heretofore entered by the Court on to-wit, September 12, 1977, be set aside.

Appellee respectfully submits that this Honorable Court erred in its ruling of September 12, 1977, and assigns the following grounds:

1. The court erred in holding that the state prosecutor failed to disclose to defense the existence of an eye-witness who positively identified assailant as someone other than Mr. Cannon.

2. The court erred in holding that the testimony of another witness, Eleanor Ann Adaway, was not shown to be derived from a source independent of an impermissible showup.

I.

The State of Alabama contends that Mrs. Sherrod did not identify the assailant as someone other than Mr. Cannon. Appellee further contends that Mrs. Sherrod's testimony was merely that she saw a beige Dodge at the service station about 7:30 on the evening in question and that the passenger was one Robert Daniel. She further testified she was not present at the time of the homicide, as she purchased some gasoline and then left to go to a local hospital (See Motion for New Trial, pp. 4-20).

Additionally, the state finds that Mrs. Sherrod's testimony that she talked to a police officer after the homicide is the only evidence concerning that conversation.

The state feels this Honorable Court has overlooked the findings of the Alabma Court of Criminal Appeals and would call the Court's attention to the opinion written by the court. The Alabama Court of Criminal Appeals found that Mrs. Sherrod's testimony was cumulative in nature and that there was doubt it would have changed the result of the trial (See opinion attached).

The state further contends that this Court has overlooked the finding of the United States District Court for the Northern District of Alabama, Southern Division. The state contends that the District Court correctly found that the transcript is unclear whether she ever identified the second man in the car as Cannon. The District Court further found that it would be difficult to see how Mrs. Sherrod's testimony would have changed the result of the trial.

The state finds Mrs. Sherrod's testimony not to be exculpatory. The state contends that the Alabama Court of Criminal Appeals and the United States District Court for the Northern District of Alabama, Southern Division, were correct in finding that there was a strong doubt this evidence would have resulted in an acquittal. *Ross v. State of Texas,* 474 F. 2d 1150 (5th Cir., 1973). Nor is there the finding of materiality as required by *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Simply, the state contends that Mrs. Sherrod's testimony fails to eliminate Cannon.

II.

The state contends that this Honorable Court has overlooked a factual determination made by the Alabama Court of Criminal Appeals. That Court, in its written opinion of August 13, 1974, clearly found that Mrs. Adaway's identification of Mr. Cannon was the result of her observing him on the night of the homicide. (See opinion attached pp. 9-10). In its opinion, the court clearly sets out the facts it found in order to come to this conclusion. Mrs. Addaway stated if she ever saw this man again she would recognize him. The state contends this Honorable Court has placed an unreasonable weight and meaning to her statement that she was able to recognize Mr. Cannon from seeing him in the showup. In light of her previous statement that she would recognize him if she saw him again, the meaning of all her statements is clear. Mrs. Addaway's inability to identify Mr. Cannon from a photograph is of no consequence. Mrs. Addaway summed it up best when she stated photographs don't always look like the people.

The state feels that this Court has further overlooked the District Court's finding that Mrjs. Addaway's identification of Cannon was the result of a 90-second period when he had stared at her. (See District Court's Examination Report and Recommendation, p. 4).

The State of Alabama contends that a rehearing should be granted. That this Honorable Court has made findings of fact contra to those made by the Alabama Court of Criminal Appeals. Further, this Court has construed the facts differently from the United States District Court for the Northern District of Alabama. The State contends the opinion of the Alabama Court of Criminal Appeals and the District Court's findings are supported by the record and should be upheld.

Respectfully submitted,

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ATTORNEY GENERAL

BARRY V. HUTNER
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Address of Assistant
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Birmingham, Alabama 35203

Tel: 251-6723

ATTORNEYS FOR APPELLE

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Application for Rehearing upon the Honorable Robert Bryan, The Florentine Building, 2021 Second Avenue North, Birmingham, Alabama, 35203, by placing a copy of same in the U.S. Mail, postage prepaid and properly addressed to him as indicated on this the 21st day of September, 1977.

Barry V. Hutner

BARRY V. HUTNER
ASSISTANT ATTORNEY GENERAL

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
NORTHERN DISTRICT OF ALABAMA
FEDERAL COURT HOUSE
BIRMINGHAM, ALABAMA 35203

JAMES E. VANDEGRIFT
Clerk

July 20, 1977

Hon. Edward W. Wadsworth, Clerk
United States Court of Appeals
600 Camp Street
New Orleans, La. 70130

Re: CIVIL ACTION NO. 75-A-0261-S
CHARLES WILLIAM CANNON vs
STATE OF ALABAMA

Dear Mr. Wadsworth:

Transmitted herewith is the Court Order dated March 29, 1976 and filed in the Clerk's Office on July 20, 1977 to be added to the certified record on appeal in the above-referenced action heretofore docketed in you court.

Please acknowledge receipt on the attached copy of this letter.

Very truly yours,
JAMES E. VANDEGRIFT, Clerk

JEV/dwm

cc: Hon. William J. Baxley, Attorney General
State of Alabama
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36104

Hon. Robert R. Bryan
2101 - 2nd Avenue, North
Birmingham, Alabama 35203

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

Filed in Clerk's Office
Northern District of Alabama
July 20, 1977
James E. Vandegrift, Clerk
United States District Court,
By:_____

CHARLES WILLIAM CANNON,)
)
Petitioner,)
)
v.) No. CA 75-A-0261-S
)
STATE OF ALABAMA,)
)
Respondent.)

ORDER

Pursuant to the Memorandum Opinion (styled "Order") and the Examination, Report and Recommendation of the Magistrate filed contemporaneously herewith,

It is ORDERED that the petition for habeas corpus filed by Charles William Cannon be and the same hereby is DENIED.

Done, this 29th day of March, 1976.

_____
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CHARLES WILLIAM CANNON,)
Petitioner)
—Vs—) NO. CA 75-A-0261-S
STATE OF ALABAMA,)
Respondent)

ORDER

The Court has considered the petition for habeas corpus filed by Charles William Cannon, the return and answer including exhibits filed by the State of Alabama in response to an Order to Show Cause directed by the U. S. Magistrate. Further, the Court has read and examined the report and recommendation of the magistrate and hereby ADOPTS and APPROVES the recommendation contained therein.

It is therefore ORDERED, for the reasons stated in the magistrate's report that the petition for habeas corpus be and the same hereby is DENIED.

The Clerk is directed to furnish petitioner and the Honorable William J. Baxley, Attorney General of the State of Alabama with a copy of this Order and the magistrate's report and recommendation.

DONE, this _____day of March, 1976.

_____
UNITED STATES DISTRICT JUDGE

Filed In Clerk's Office
Northern District of Alabama
March 29, 1976
James E. Vandegrift, Clerk
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CHARLES WILLIAM CANNON,)

Petitioner)

—Vs-) NO. CA 75-A-0261-S

STATE OF ALABAMA,)

Respondent)

Filed In Clerk's Office
Northern District Of Alabama
March 29, 1976
James E. Vandegrift, Clerk
United States District Court
By:

EXAMINATION, REPORT AND RECOMMENDATION

Petitioner, Charles William Cannon, was convicted in the Circuit Court of Jefferson County, Alabama on February 18, 1973 of murder in the second degree and sentenced to twenty-three years' imprisonment. On this petition for habeas corpus relief, he alleges two grounds for relief which the Court must consider. They are: (1) that he was denied the assistance of counsel at a post-indictment lineup at which he was identified by a witness who later identified him in court; and, (2) the prosecution withheld exculpatory evidence when it failed to inform him of the existence of a witness present at the scene of the killing.

The state has included as a part of its response, the transcript of the trial and hearing on the motion for new trial filed by Cannon and the opinion of the Alabama Court of Criminal Appeals.

DENIAL OF COUNSEL AT LINEUP

The evidence at trial was that Jack Warren, Jr. was killed at approximately 8:00 o'clock P.M. on May 31, 1972 in a scuffle which ensued after two black males arrived at a service station where Warren was employed on the North side of Birmingham, Alabama. There were at least two witnesses present at the time of the killing. Samuel Wheeler, a sixteen year old employee at the station, testified that Warren and the petitioner got into a fight after Warren told Cannon to move his vehicle so that other cars could be serviced. During the scuffle, Cannon knocked Warren's gun from his hand, retrieved it and shot him. After some initial difficulty in identifying Cannon, Wheeler identified him from photographs shown to him at police headquarters on the fourth try. He was also able to identify the second black male as one Josh Stephens.

Terry Lynn Ferguson, a ten-year old girl, testified for the defense that she was present at the time of the killing and that the assailant was not Cannon. On cross-examination, she admitted that she had previously identified Cannon as the person who had done the killing.

The state called as a rebuttal witness, Mrs. Eleanor Ann Adaway, who said that she and her husband had walked to the service station to buy gasoline shortly before 8:00 o'clock P.M. on May 31, 1972 and had seen the appellant sitting in an automobile; that he had stared at

her for approximately ninety seconds; and, that she had gotten a good look at his face. After putting the gasoline in their stalled automobile, she and her husband returned to the service station, by which time the killing had occurred. She contacted the police two days later when she saw and recognized the person who had been driving the automobile at the service station. She identified the photograph of the driver, one Josh Stephens, approximately two weeks after the incident. She was never able to positively identify Cannon from photographs but testified that she had been asked to come to the courthouse during the course of Cannon's trial; that a policeman had asked her to walk down a hall and look into the courtroom to see if she saw anyone she recognized; that she walked down the hall and recognized petitioner, Charles Cannon, sitting on a bench between two black females as the person who had stared at her at the service station just prior to 8:00 o'clock P.M. on May 31, 1972. She testified that Cannon stood out as being dressed very nicely and that in addition to Cannon, the only other black males she saw were eight to ten persons in the courtroom itself. It is her identification of Cannon outside the courtroom during the course of his trial at which petitioner claims he had a right to have his counsel present.

That a defendant is entitled to be represented by counsel at a lineup is clearly established, *United States v. Wade*, 388 U. S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967). The Court based its decision on the Sixth Amendment right to counsel to protect the defendant's Sixth Amendment right to confront one's accusers. *Wade* did not establish a per se rule excluding an in-court identification of a witness who had observed a lineup where the defendent was not represented by counsel,

but rather, held that in such cases, the prosecution whould have "to establish by clear and convincing evidence that the in-court identification was based on observations of the suspect other than the lineup identification." In a case decided the same date, the court held that there was a per se rule excluding testimony by a witness that such witness had made an identification at a lineup which was violative of *Wade, Gilbert v. California,* 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed. 2nd 1178 (1967). On the same day that the court rendered the decision in *Wade* and *Gilbert,* it also decided *Stovall v. Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed. 2d 1199 (1967) where it held *Wade* and *Gilbert* were not to apply retroactively, although pre-*Wade* lineups could be so unnecessarily suggestive as to violate the Due Process Clause. In *Kirby v. Illinois,* 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411, (1972), the court decided that the *Wade* standards only applied after adversary judicial proceedings had begun against a defendant. In addition to the independent source exception to the requirements of *Wade,* some courts have applied a harmless error rule to *Wade* violations, *United States* ex rel. *Gates v. Twomey,* 325 F.Supp. 920 (1971); *Utsler v. Erickson,* 440 F.2d 140 (1971), cert.den. 404 U.S. 956. It may be safely assumed that most, if no all, identification-type confrontations which occur after arrest will fall within the rules announced in *Wade* and *Gilbert*. See *Rivers v. United States,* 400 F. 2d 935 (5th Cir. 1968). Here, we have a confrontation arranged by police officers which cannot be neatly placed into any well-defined category to which the appropriate rule can be clearly and simply applied. This confrontation was certainly not the classic lineup in which a group of individuals exhibiting similar characteristics are shown to a witness who is then given an opportunity to identify one or more of the participants.

On the other hand, it is clear that the confrontation was arranged by police officers to give Mrs. Adaway an opportunity to observe the petitioner Cannon and to identify him if she was able to do so. The confrontation occurred well after the beginning of adversary proceedings. Indeed, the trial itself was virtually complete at the time. Considering the totality of the circumstances, the magistrate is of the opinion that the confrontation was one subject to the requirements of *Wade* and that petitioner's counsel should have been given an opportunity to be present when it took place. This being the case, the per se exclusionary rule of *Gilbert* made inadmissible any testimony about her identification of Cannon in the hallway outside the courtroom. However, her direct testimony was that she saw Cannon at the scene of the crime immediately prior to the shooting. It was only on cross-examination by defense counsel that her testimony concerning the hallway identification was illicited. The state was therefore entitled to show that her in-court identification had a source independent of the hallway confrontation. Mrs. Adaway testified that the petitioner had stared at her for some ninety seconds and that she had become annoyed because of this and had tried to stare him down before averting her eyes. She had never identified anyone else as the person she had seen in the car though she had been unable to positively identify Cannon from photographs. She had also told policy that if she ever saw the man again she would recognize him. A careful reading of the testimony leaves little doubt that her in-court identification was founded upon her observation of him on the night Jack Warren, Jr. was killed and was not based on the confrontation outside the courtroom. Consequently, the petition should not be granted on this ground.

WITHHOLDING BY THE PROSECUTION OF EXCULPATORY EVIDENCE

On a motion for a new trial, petitioner presented the testimony of Mrs. Grace Mae Sherrod who testified that she stopped at the service station to obtain gasoline between 7:30 P.M. and 8:00 P.M. on the evening of the killing and that she saw two black men in an automobile similar in color to the automobile which witness Samuel Wheeler had said Cannon arrived in that evening. Mrs. Sherrod Testified that she knew the drive of the automobile was one Robert Daniel; that he spoke to her while there and that the driver was not the petitioner Cannon. It is unclear from the transcript whether she was able to eliminate the second black man who she said never left the car while she was there as being Cannon. The petitioner alleges that this witness was interviewed by a Birmingham Police officer on the night of the killing and that the prosecution failed to disclose her existence to the defendant. The evidence at trial was that the district attorney's office had not been informed of the existence of the witness. It is a denial of due process where the prosecution withholds from the defendant material evidence of an exculpatory nature whether such evidence bears upon the question of guilt or degree of punishment of the accused, *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963). The magistrate has found no case where the United States of Appeals for the Fifth Circuit has directly held such but it appears that it would make little or no difference whether the existence of exculpatory evidence was actually known to the district attorney if such evidence was know to the investigating law enforcement officers. At least two circuit courts of appeal have so held, *Clarke v. Burke*, 440 F.2d 853 (7th Cir. 1971); *Barbee*

v. Warden, Maryland Penitentiary, 331 F.2d 842 (4th Cir. 1964). The Fifth Circuit Court has indicated that it would follow those courts. In *Jackson v. Wainwright,* 390 F.2d 288 (5th Cir. 1968) the court cited with apparent approval, the holding of the Fourth Circuit in *Barbee, supra.* It would thus not be decisive to the issue here that the prosecutor did not have actual knowledge of the witness. It is sufficient that the police officer knew. The more critical question is whether the testimony of Mrs. Sherrod was such as would justify setting aside an otherwise valid conviction. Where, as here, there is no question of prosecutorial misconduct or a specific request for the evidence the Fifth Circuit has required a showing of more than a mere possibility that the evidence would have affected the result of the trail, *Ross v. State of Texas,* 474 F.2d 1150 (5th Cir. 1973). There, quoting Judge Friendly from *United States v. Keogh,* 391 F.2d 138 (2nd Cir. 1968), the court stated the rule in this circuit as follows:

> ...the wider interests of society unite to require a substantially higher probability that disclosure of the evidence to the defense would have altered the result. To invalidate convictions in such cases because a combing of the prosecutor's files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict would create unbearable burdens and uncertainties.

Here, there was an eye-witness who testified that he saw Cannon pick up the pistol with his left hand, push the victim back with his right hand, change the pistol to his right hand and shoot. There was a second eye-witness who identified Cannon as being in an automobile outside the station just minutes prior to the killing.

The one witness to the killing for the defendant who said that the killer was someone other than Cannon, admitted on cross-examination that she had previously identified the killer as Cannon. Cannon presented at trial, numerous alibi witnesses whose testimony tended to show that he could not have been present at the time of the killing. It is obvious that the jury chose to believe the state's witnesses rather than the petitioners. While it is arguable that the testimony of Mrs. Sherrod at the trial proper might have changed the verdict, considering the total record and the evidence presented at trial, it is difficult for the magistrate to see how it could arguably be said that there is more than a mere possibility that her testimony would have changed the result. Accordingly, it is the recommendation of the magistrate that the petition for the writ of habeas corpus be denied on this ground.

DATED, this _____ day of March, 1976.

_____

EDWIN L. NELSON
United States Magistrate

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CHARLES WILLIM CANNON,)
Petitioner)
— Vs —) no. CA 75-A-0261-S
STATE OF ALABAMA,)
Respondent)

ORDER

The Court, on March 29, 1976, denied a petition for writ of habeas corpus. Petitioner Charles William Cannon has filed, on Arpril 14, 1976 a motion for a certificate of probable cause.

After due consideration of the record in this matter, the Court is of the opinion that there exists substantial questions on which petitioner is due appellate review. Accordingly, the certificate of probable cause should be and the same hereby is GRANTED.

The Clerk is directed to furnish petitioner, his attorney of record, Robert R. Bryan, Esquire and the Honorable William J. Baxley, Attorney General of the State of Alabama with a copy of this Order.

DONE, this _____ day of April, 1976.

UNITED STATES DISTRICT JUDGE

Filed In Clerk's Office
Northern District Of Alabama

Apr 21, 1976

James E. Vandegrift, Clerk
United States District Court
By: Dale W. Mardis

NO. OFFICE	DOCKET YR.	DOCKET NUMBER	FILING DATE MO.	FILING DATE DAY	FILING DATE YEAR	J	N/S	O	R	R 23	$	DEMAND OTHER	JUDGE NUMBER	JURY DEM.	DOCKET YR.	DOCKET NUMBER
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PLAINTIFFS

CHARLES WILLIAM CANNON

CA 75A0261S

DEFENDANTS

STATE OF ALABAMA

CAUSE 28 USC 2254 — Habeas Corpus

rfd

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DC-111 (Revised)

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JAMES E. VANDEGRIFT, Clerk
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
BY: Deputy Clerk

UNITED STATES DISTRICT COURT DOCKET

CA 75A0261S

DATE 1975	NR	PROCEEDINGS
Mar 7		Motion to proceed in forma pauperis filed - del ELN
7		petition for writ of habeas corpus filed — del ELN
11		Order to show cause granting motion to proceed in forma pauperis and ordering respondent to appear and show cause in writing within 20 days from date of order why requested relief should not be granted and petitioner shall have 10 days to file traverse — filed and entered (Nelson) - cm
31		Return and answer of defendant (6 transcripts attached) filed - cs - del ELN
1976		
Mar. 29		Examination, Report and Recommendation of U.S. Magistrate Nelson - filed - cm
29		ORDER approving and adopting the recommendation of the U. S. Magistrate Nelson and further denying petition for writ of habeas corpus - filed and entered (ALLGOOD) - cm
Apr. 14		Motion of petitioner for certificate of probable cause in appeal for habeas corpus filed - gg - del ELN
Apr. 14		Motion of petitioner for leave to appeal in forma pauperis - filed - cs - del ELN
Apr. 22		ORDER dated April 21, 1976, granting motion of petitioner for certificate of probable cause - filed and entered (ALLGOOD) - cm

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 76-2118

D. C. Docket No. CA-75-A 0261-S

CHARLES WILLIAM CANNON,
Petitioner-Appellant,

versus

STATE OF ALABAMA,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Alabama

Before GOLDBERG, SIMPSON and FAY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed.

September, 12, 1977

Issued as Mandate: Oct. 28, 1977
A TRUE COPY
JAMES E. VANDEGRIFT, Clerk
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
BY:
Deputy Clerk

FILED IN CLERK'S OFFICE
NORTHERN DISTRICT OF ALABAMA

JAMES E. VANDERGRIFT, CLERK
UNITED STATES DISTRICT COURT
BY:

A TRUE COPY
TEST: EDWARD W. WARDSWORTH
CLERK, U. S. COURT OF APPEALS,
FIFTH CIRCUIT

By
Deputy

New Orleans, Louisiana
Oct 28, 1977

CANNON v. STATE OF ALABAMA

Charles William CANNON,
Petitioner-Appellant,

v.

STATE OF ALABAMA,
Respondent-Appellee.

No. 76-2118

United States Court of Appeals,
Fifth Circuit.

Sept. 12, 1977.

The United States District Court for the Northern District of Alabama, at Birmingham, C. W. Allgood, Jr., denied habeas relief, and petitioner appealed. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) state prosecutor's failure to disclose to defense existence of eyewitness who positively identified assailant as someone other than petitioner invalidated conviction and (2) use of testimony of another witness, who recognized petitioner at postindictment showup at which petitioner's counsel was not present and whose in-court identification of petitioner was not shown to be derived from source independent of impermissible showup. violated petitioner's Sixth Amendment right to counsel.

Reversed.

Synopses, Syllabi and Key Number Classification
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The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

James E. Vandegrift, Clerk
United States District Court
By: _____

1. Constitutional Law ◄ 268(5)

In determining whether failure to disclose exculpatory information for which there was no specific request violated due process, analysis of evidence adduced at trail and probable impact of undisclosed information is required, and in such context Court of Appeals cannot merely consider evidence in light most favorable to government but must instead evaluate all evidence as it would bear on deliberations of a fact finder.

2. Criminal Law ◄ 700

Where justice of finding of guilt was subject to considerable doubt even without testimony of undisclosed eyewitness, and undisclosed eyewitness' testimony positively identifying passenger said to have committed crime undeniably created reasonable doubt that did not otherwise exist, state prosecutor's failure to disclose to defense existence of eyewitness who would positively identify assailant as someone other than petitioner invalidated petitioner's state court murder conviction.

3. Criminal Law ◄ 1171.(1)

Court of Appeals must assess impact of undisclosed evidence on reasonable fact finder and defense need not demonstrate that undisclosed information probably would have resulted in acquittal.

4. Habeas Corpus ◄ 45.1(4)

Issue which was adjudicated on the merits by state appellate court was open on federal habeas.

5. Habeas Corpus ◄ 45.1(4)

Federal courts in habeas proceedings are not foreclosed from reaching issues state courts treat as open.

6. Constitutional Law ◄ 266(3)

Use of evidence derived from suggestive identification procedures denies due process if testimony is sufficiently unreliable.

7. Constitutional Law ◄ 266(3)

In determining whether use of evidence derived from suggestive identification procedures denies due process, relevant factors include opportunity of witness of view criminal at time of crime, witness' degree of attention accuracy of his prior description of criminal level of certainty demonstrated at confrontation and time between crime and confrontation; court must weigh corrupting effect of suggestive identification against these and any other factors affecting reliability.

8. Criminal Law ◄ 339.6, 339.10(4)

State may not adduce any evidence of improperly uncounselled identification procedure; state may, however, present in-court identification by witness previously subjected to uncounselled procedure so long as state demonstrates by clear and convincing evidence that in court identification is based upon other observations of suspect.

10. Criminal Law ◄ 394.(1)

Per se exclusionary rule applies only to evidence adduced by state.

11. Criminal Law ◄ 692
Witness ◄ 330(1)

Defense had right to elicit evidence of showup on cross-examination in effort to undermine witness' testimony, and by doing so did not compromise its ability to challenge State's use of in-court identification by witness, prejudice from which had already been incurred.

12. Criminal Law◄ 339.10(4)

Use of testimony of witness, who at photographic identification session two weeks after shooting was unable to identify picture of petitioner as person she saw in back seat, who during petitioner's trial nearly nine months later identified petitioner at suggestive identification procedure deliberately staged by police in absence of defense counsel, and who testified that "only way" that she could identify petitioner at trial was because she had identified him at previous day's showup, violated petitioner's Sixth Amendment right to counsel. U.S.C.A. Const. Amend. 6.

Appeal from the United States District Court for the Northern District of Alabama.

Before GOLDBERG, SIMPSON and FAY, Circuit Judges.

GOLDBERG, Circuit Judge:

In a Birmingham service station on the night of May 31, 1972, a black customer shot and killed the manager, son of the city's deputy police chief. The state of Alabama charged Charles William Cannon with murder

in connection with that shooting. The sole issue at trial was the identity of the assailant. The state presented one eyewitness who identified Cannon as the killer and another eyewitness who placed Cannon at the scene just prior to the event. Cannon impeached the testimony of those two witnesses and presented extensive alibi evidence. A jury found him guilty of second-degree murder and fixed his sentence at twenty-three years imprisonment. The court entered judgment accordingly.

Cannon now comes before us alleging that the state committed two constitutional errors affecting the determination of guilt or innocence. We agree. The first was the prosecutors failure to disclose to the defense the existence of an eyewitness who would positively identify the assailant as someone other than Cannon. *Se Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Because the state's evidence was already very weak, the undisclosed eyewitness testimony would have created a reasonable doubt of Cannon's guilt. The second constitutional error was the staging of a post-indictment showup at which Cannon's counsel was not present. *See United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). The state did not establish that the witness's in-court identification of Cannon derived from a source independent of the impermissible showup. Indeed, the record demonstrates the contrary.

Either of these errors, standing alone, would invalidate Cannon's conviction. We reverse the district court's denial of habeas relief.[1]

1. The district court adjudicated the case on the basis of the state trial record and the transcript of the state court hearing on Cannon's new trial motion. Cannon has exhausted his state remedies.

I

(1) The Supreme Court has recently dealt at some length with a prosecutor's duty to disclose to the defense exculpatory information. *See United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Emphasizing that "the prudent prosecutor will resolve doubtful questions in favor of disclosure," 427 U.S. at 108, 96 S.Ct. at 2399, 49 L.Ed.2d at 352, the Court held that failure to disclose information for which there has been no specific request violates due process only "if the omitted evidence creates a reasonable doubt that did not otherwise exist." 427 U.S. at 112, 96 S.Ct. at 2401, 49 L.Ed.2d at 355.[2] Apply in this standard requires an analysis of the evidence adduced at trial and of the probable impact of the undisclosed information. In this context we cannot merely consider the evidence in the light most favorable to the government but must instead evaluate all the evidence as it would bear on the deliberations of a factfinder.

Our careful review of the record indicates that, even without the testimony of the undisclosed eyewitness,

2. Whether a prosecutor must disclose a particular item depends upon whether it is "material." The standard for judging materiality differs among three categories. The first encompasses cases in which the undisclosed information indicates that the prosecution's case includes perjured testimony, as the prosecutor knew or should have known. *See, e. g., Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935). The second category comprises cases in which defense counsel has made a specific request for a particular item. *See Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The Third category includes cases in which defense counsel has made no request or only a general request for all "excupatory material." *See United States v. Agurs, supra*. The case at bar falls into this third category.

evidence of Cannon's guilt was extremely weak. Evidence linking Cannon to the shooting came from but two witnesses, only one of whom testified during the prosecution's case in chief. that witness was Samuel Wheeler, an attendant at the gas station and an eyewitness to the crime. His testimony apparently tracks the state's theory of the case.

The substance of that testimony follows. Wheeler, a sixteen-year-old student, was working at Birmingham's Crystal Service Station on the afternoon of May 31, 1972. Jack Warren, Jr., the victim, was in charge of the station.[3] Warren had been in the station drinking beer for nearly two hours when two black men in an old beige Dodge pulled up to one of the pumps. Wheeler identified the driver as Josh Stephens and the passenger as Cannon. Wheeler pumped two dollars worth of gas and received payment from the driver. The passenger went into the station building. Apparently upon a delay in removing the car from the pump area,[4] Warren brusquely told the passenger to move the car and to leave the office. The passenger left the office after disclaiming ownership of the car or authority to move it.

Warren told Wheeler that the passenger had been "trying to get smart." Warren picked up a gun off a storage room shelf and put in in his pocket. Apparently upon hearing the earlier remark, the passenger came back

3. Warren, who was "visiting" the station and may have had no formal connection with it, was in charge while the owner went for sandwiches.

4. The defense presented testimony that the delay resulted from dead battery, that the driver summoned help from a nearby garage, and that the garage operator managed to start the car.

inside. Warren repeated his instruction to move the car, and the passenger repeated his statement that he could not do so. Warren pulled the gun from his pocket. The passenger overpowered Warren, took the gun, and shot and killed Warren.

The defense challenged no part of Wheeler's testimony except his identifications of the driver and the passenger. The attack on Wheeler's credibility regarding that testimony was telling. Wheeler admitted making statements to several persons disavowing knowledge of who had committed the crime. Immediately after the shooting Wheeler told the police, a newspaper reporter, and his own mother that he could not identify the assailant. Because Wheeler concededly knew Cannon, those earlier statements directly contradicted Wheeler's trial testimony. In addition, Wheeler first identified Cannon four weeks after the shooting. During that four-week period, police concededly took Wheeler to City Hall three or four times and talked with him on at least ten or fifteen other occasions, constantly urging him to implicate Cannon. Perhaps most significantly, Wheeler testified that a detective told him that he would go to jail if he failed to identify Cannon as the assailant.[5] Throughout the four-week period, Wheeler denied Cannon's involvement.

The defense thus left Wheeler's testimonly badly impaired. The only additional witnesses in the prosecution's case in chief were the victim's father (who testified to the undisputed identity of the victim), the deputy coroner (whose testimony included nothing of relevance here), and a police sergeant (who denied threatening

5. The record does not indicate why the police originally focused their investigation on Cannon.

Wheeler but admitted questioning Wheeler perhaps more than twenty times in the weeks prior to Wheeler's identification of Cannon). The state had brought forth only one witness linking Cannon to the crime. That witness testified that he had identified Cannon after four weeks of taking a contrary position and after the police threatened to jail him if he did not make the identification.

In response to the already weak government showing, the defense presented extensive evidence. Cannon testified that he had been playing the card game "whist" at the time of the shooting. No fewer than thirteen witnesses corroborated that story. In addition, five separate witnesses testified that they had been at the service station shortly before the shooting, observed the two men in the beige car, and knew that neither of those men was Cannon.[6] All of these witnesses, then, provided testimony directly contradicting that of the state's sole substantive witness to that point, Samuel Wheeler. Moreover, the defense presented testimony that Wheeler had a bad reputation for truthfulness.[7].

6. Although these witnesses did not know who the passenger was, they knew he was not Cannon.

7. The defense also presented uncontradicted evidence tending to indicate that Josh Stephens, whom Wheeler identified as the driver, had been in North Carolina at the relevant time. At some point Stephens moved from Birmingham to durham. On Tuesday, May 30, the day before the killing. Stephens attended a job interview in Durham, indicating his prospective employer subsequently left a message at Stephens' Durham residence indicating Stephens was hired effective Monday, June 5. Stephens received the message and began employment as scheduled. Although this evidence does not establish that Stephens was not in Birmingham on May 31, it does call this aspect of Wheeler's testimony into question.

On rebuttal the prosecution produced a second witness linking Cannon to the shooting. Eleanor Ann Adaway had been in the station shortly before the shooting and had seen the beige car. Unlike *every* other witness who had seen the car, Adaway testified that it carried three, not two men. Like Samuel Wheeler, she identified the driver as Josh Stephens. She said she had not seen the front-seat passenger's face and could not identify him. She testified that the third person, sitting in the back seat, was Cannon.

The defense secceeded in casting considerable doubt on Adaway's testimony. First, her account was inconsistent with that of every other witness; she alone had placed Cannon in the car's rear seat or indicated there were three passengers. Second, she had been unable to recognize Cannon's photograph after the event and had made her in-court identification only after a suggestive pretrial procedure affording little basis for confidence in the result.[8]. Thus Adaway's testimony, like Wheeler's, was anything but compelling. The state produced no other witness linking Cannon to the crime.

It is against this background that we must assess the evidence the prosecutor withheld from the defense. That evidence was the testimony of Gracie Mae Sherrod. She said she was buying gas at the service station when the beige car pulled in. There were two blacks in the car. The passenger got out and spoke to Sherrod. She recognized him as Robert Daniels. She also knew Cannon but did not see him at the station that night.

8. In addition, Adaway's identification of Stephens as the driver was questioned by the defense. *See note 7 supra.*

On the night of the shooting, Sherrod provided this information to a Birmingham police detective. She showed the detective where Danieis lived. The detective made notes. Sherrod heard nothing further about the crime until after Cannon's conviction. Only then did the defense learn of Sherrod.

(2,3) This undisclosed information clearly warrants reversal under the *Agurs* standard. As the Court emphasized, "The proper standard . . . must reflect our overriding concern with the justice of the finding of guilt." *United States v. Agurs, supra,* 427 U.S. at 112, 96 S.Ct. at 2401, 49 L.Ed.2d at 354 (footnote omitted). In the case at bar the "justice of the finding of guilt" was subject to considerable doubt even without the *Agurs* violation. Sherrod's eyewitness testimony positively identifying the passenger said to have committed the crime undoubtedly "creates a reasonable doubt that did not otherwise exist." 427 U.S. at 112, 96 S.Ct. at 2401, 49 L.Ed.2d at 355.[9]

9. Commendably, the state does not advance the disingenuous argument that any reasonable doubt already existed, thus depriving Sherrod's testimony of any practical significance. While it is true that the jury convicted Cannon despite weak evidence, we will not assume that the jury would also have convicted on the basis of the weaker showing that would have been present after Sherrod testified. Sherrod's testimony did not merely track that of other witnesses; she alone could have provided the passenger's identity.

Moreove, in *Agurs* the Supreme Court rejected the "sporting theory of justice" under which undisclosed evidence would be evaluated in terms of its possible effect on an irrational jury. *See* 427 U.S. at 108, 96 S.Ct. at 2400, 49 L.Ed.2d at 352-53. We must assess the evidence's impact on a reasonable factfinder. The defense need not demonstrate that the undisclosed information "probably would have resulted in acquittal." *See* 427 U.S. at 111, 96 S.Ct. at 2401, 49 L.Ed.2d at 354.

As the Court said in *Agurs,* "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." 427 U.S. at 113, 96 S.Ct. at 2402, 49 L.Ed.2d at 355. Here, the verdict was already of questionable validity, and the additional evidence is of relatively major importance.[10] If the prosecutor's failure to disclose exculpatory information can ever invalidate a conviction, it does so in this case.[11]

10. Indeed, our situation is so extreme that it approaches hypotheticals that have been used to demonstrate instances clearly requiring prosecutors to disclose. *See Ross v. Texas,* 474 F.2d 1150, 1154 (5th Cir. 1973). *cert. denied,* 414 U.S. 850, 94 S.Ct. 141, 38 L.Ed.2d 98 (1973) (conviction would be invalid if prosecutor had withheld "an eyewitness . . . who would have testified that (defendant) was not the robber"); Comment, *Brady v. Maryland and the Prosecutor's Duty to Disclose,* 40 U.Chi.L.Rev. 112, 125 (1972), *quoted with approval, United States v. Agurs,* 427 U.S. 97, 112 n.21, 96 S.Ct. 2392, 2402 n.21, 49 L.Ed.2d 342, 355 n.21 (1976).

11. *Agurs* left some ambiguity concerning in whose mind the omitted evidence must be deemed to create a reasonable doubt. The Court said,

> (S(ince after considering (the undisclosed information) in the context of the entire record the trial judge remained convinced of (the defendant's) guilt beyond a reasonable doubt, and since *we are satisfied that his firsthand appraisal of the record was thorough and entirely reasonable,* we hold that the prosecutor's failure to tender (the undisclosed information) did not deprive (the defendant) of a fair trial as guaranteed by the Due Process Clause of the Fifth Amendment.

427 U.S. at 114, 96 S.Ct. at 2402, 49 L.Ed.2d at 355–56.

In the case at bar any "thorough and entirely reasonable" analysis of this record could lead to no other conclusion than that the undisclosed information created a reasonable doubt of guilt. We must therefore reverse the denial of habeas relief.

II.

(4,5) The second constitutional error that infected the truth finding process involved the state's star rebuttal witness, Eleanor Ann Adaway.[12] After running out of gas on a nearby street, Adaway and her husband walked into the Crystal Service Statio shortly before the shooting. Adaway testified that she saw the beige car at the pumps with three people in it. She was unable to describe the person in the passenger seat, whose face she was unable to see. She identified the driver as Josh Stephens. At a photographic identification session two to three weeks after the shooting, she was unable to identify a picture of Cannon as the person she saw in the back seat. At that time she said that if she ever again saw that passenger, she would be able to identify him. The police did not speak further to Adaway before the trial. They never staged a lineup during which she could view Cannon.

With the trial going badly, however, two detectives went to see Adaway. They told her to come to the courthouse the next day. During a recess, the police told Adaway to "walk down . . the hall, . . . look at the people in the hall," and to "go to the courtroom door and look through the courtroom door and see if you see anybody you recognize." Cannon was sitting on a bench in the hall with two black women. Whether

12. The state does not argue that Cannon waived this issue by failing to raise it at trial. The state appellate courts adjudicated the issue on the merits. The issue is therefore open on federal habeas. The rule of *Wainwright v. Sykes, — U.S. —, 97 S.Ct. 2497, 53 L.Ed.2d — (1977) does not foreclose federal* courts from reaching issues state courts treat as open. *See, e. g., Francis v. Henderson,* 425 U.S. 536, 542 N.5, 96 S.Ct. 1708, 1711 n.5, 48 L.Ed.2d 149, 154 n.5 (1976).

the circumstances suggested that Cannon was the defendant in unclear. Adaway identified Cannon as the person who had been in the back seat of the car. Asked on cross-examination how she could positively identify Cannon when two to three weeks after the shooting she had been unable to do so, Adaway testified that, "The only way I could is because when I walked down the hall yesterday he looked up at me, and that is when I identified him."

(6-8) The Supreme Court has dealt with identification procedures in a series of decisions spanning the last decade. Such procedures are subject to attack on two separate grounds: due process and right to counsel. The use of evidence derived from suggestive identification procedures denies due process if the testimony is insufficiently reliable.[13] In the case at bar we need not consider whether Adaway's testimony meets this due process standard, for here the state violated Cannon's independent right to counsel. The right to counsel at

13. The linchpin of due process analysis is the identification's reliability. *Mason v. Brathwaite,* ____ U.S. ____, ____, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). The relevant factors "include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation" *Id.* A court must weigh "the corrupting effect of the suggestive identification," *id.,* against these and any other factors affecting reliability. The Supreme Court sustained a due process attack in *Foster v. California,* 394 U.S. 440, 89, S.Ct. 1127, 22 L.Ed. 2d 402 (1969). It rejected due process attacks in *Stovall v. Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); *Simmons v. United States,* 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); *Coleman v. Alabama,* 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970); *Neil v. Biggers,* 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), and *Manson v. Brathwaite, supra.*

identification procedures derives from *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) and *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967). The right attaches upon the institution of formal charges, see *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972), and applies to live but not photographic identification procedures. *See United States v. Ash*, 413 U. S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973).[14] In the case at bar we confront a live identification staged after the institution of formal charges. Cannon therefore clearly had the right to the presence of counsel, as the state apparently concedes.

(9) Having found that right violated, we look to *Wade* and *Gilbert* to determine the admissibility of Adaway's testimony. The state may not adduce any evidence of an improperly uncounselled identification procedure. *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967). The state may, however, present an in-court identification by a witness previously subjected

14. In its brief the state intimates that *Wade* and *Gilbert* might not apply to the informal identification procedures involved here. We disagree. Though often referred to as "lineup" cases, *Wade* and *Gilbert* govern other types of live identifications as well. *See, e. g., Rudd v. Florida* 477 F.2d 805, 809—10 n. 5 (5th Cir. 1973); *Rivers v. United States*, 400 F.2d 935, 940 (5th Cir. 1968). Indeed, less formalized procedures present a greater need for safeguards than do traditional lineups. Under *Ash* there is no right to counsel at photographic indentification procedures not requiring the defendant's presence, but in any manner of proceedings requiring the defendant's presence the right to counsel attaches. The state does not and could not suggest that Adaway happened upon Cannon inadvertently, *Cf. United States v. Davis*, 487 F.2d 112, 122 (5th Cir. 1973). The police deliberately staged this identification procedure.

to such an uncounselled procedure so long as the state demonstrates "by clear and convincing evidence that the in-court identification (is) based upon observations of the suspect other than the lineup identification." *United States v. Wade*, 388 U.S. 218, 240, 87 S.Ct. 1926, 1939, 18 L.Ed.2d 1149 (1967?.[15]

(10, 11) In the case at bar the prosecution did not introduce evidence of the improper showup; it introduced only what purported to be an in-court identification.[16] The question is therefore whether the state has met the *Wade* standard. The record clearly indicates that it has not.

(12) The Supreme Court has listed various examples of the factors that should guide the determination of whether an in-court identification is independent of the uncounselled confrontation. They include "the prior

15. Some had originally thought that an analogous distinction between evidence of the challenged procedure and in-court identifications was relevant in due process cases, but the Supreme Court rejected that notion in *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) and *Manson v. Brathwaite*, — U.S.____, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). Compare *id.* at ____ — ____, 97 S.Ct. 2255 (Marshall, J., dissenting). Those cases, however, cast no doubt upon *Gilbert*, which continues to provide a per se rule precluding the state from introducing evidence of the impermissibly uncounselled identification procedure.

16. Evidence of the showup did go to the jury; the defense elicited it on cross-examination in an effort to undermine Adaway's testimony. As *Wade* itself establishes, the per se exclusionary rule applies only to evidence adduced by the state. *See* 388 U.S. at 240 &n. 32, 87 S.Ct. at 1939 & N. 32. See also *Rudd v. Florida*, 477 F.2d 805, 807 n. 3 (5th Cir. 1973). The defense has the right to conduct such cross-examination, and in doing so it of course does not compromise its ability to challenge the state's use of the in-court identification, the prejudice from which has already been incurred.

opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification." *United States v. Wade, supra,* 388 U.S. at 241, 87 S.Ct. at 1940. Here Adaway observed the passenger for ninety seconds at about sundown. She had no reason to try to remember him, being unaware that a crime would soon occur. The showup idendification came nearly nine months later, in Mid-February 1973. She had not identified Cannon earlier; indeed, she had failed to recognize his picture shortly after the shooting.

Wade also noted that a court should consider "those facts which, despite the absence of counel, are disclosed concerning the conduct of the lineup." *United States v. Wade supra,* 388 U.S. at 241, 87 S.Ct. at 1940 (footnote omitted). Here our information is incomplete, but we do know that the procedure was suggestive at best. Cannon was sitting with two women; there may have been no other black men nearby. Although Adaway said ther were eight or ten black men in the entire area she was to survey, we do not know whether their dress, behavior or location indicated that Cannon, not one of them, was the defendant. Nothing in the record points to a reliable procedure.

The *Wade* factors, moreover, were not intended to be exhaustive. They are but guides to the required inquiry, the independence of the in-court identification from the earlier uncounselled procedure. We may consider any evidence that bears on that inquiry. In the case at

bar, the most telling factor is Adaway's own statement that the "only way" that she could identify Cannon at trial was that she had identified him at the previous day's showup. A more compelling statement that the in-court identification bore the taint of the impermissible showup could hardly be expected. This statement, augmented by the long delay between the shooting and the challenged showup and by Adaway's inability to recognize Cannon's photograph some two to three weeks after the shooting, wholly refutes the state's assertion that Adaway was able independently to identify Cannon at the time of trial. Far from establishing by "clear and convincing evidence" that the in-courft identification was independent of the impermissible showup, this record demonstrates the contrary.[17] The use of Adaway's testimony violated Cannon's sixth amendment right to counsel under *United States v. Wade, supra,* and requires reversal of his conviction.[18]

17. We do not at this point hold that the state cannot, if it chooses to retry Cannon, attempt to lay the necessary predicate for use of Adaway's testimony on retrial. Although this record renders unlikely the possibility that the state could make the requisite clear and convincing showing, we need not decide at this time whether the testimony before us would be conclusive on the issue even if the state should somehow adduce new and persuasive evidence that the taint of the illegal showup had dissipated. Should the state seek to use Adaway's identification testimony on retrial, measuring the evidence against the standards of *United States v. Wade, supra,* will be a task addressed in the first instance to the state trial court, subject always to appropriate review.

18. As mandated by *Manson v. Brathwaite,* ____ U.S. ____, ____, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), we have analyzed the admissibility of the identification testimony without regard to whether it is corroborated by other evidence. But we, like the Court in *Mason,* not that our conclusion is "hardly undermined" by the fact that Adaway's testimony that there were three (not two) people in the beige car is inconsistent with the testimony of *every* other witness who was at the station.

Conclusion

We have held that the *Agurs* and *Wade* violations invalidate Cannon's conviction. The district court's decision is REVERSED.

A true copy
Test: Edward W. Wadsworth
Clerk, U. S. Court of Appeals, Fifth Circuit

By _____

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